1941

Aileen Webb v. Herbert A. Snow, Erastus P. Snow, Ann Pymm Snow, Evalyn S. Decker and Agnes S. Gallacher : Brief of Respondent

Utah Supreme Court

Raymond R. Brady; Joseph R. Haas; Attorneys for Plaintiff and Respondent;

No. 6381

In
The Supreme Court
of the
State of Utah

AILEEN WEBB,
Plaintiff and Respondent,

vs.

HERBERT A. SNOW, ERASTUS P. SNOW, ANN PYMM SNOW, EVALYN S. DECKER AND AGNES S. GALLACHER,
Defendants and Appellants.

Appeal From Third District Court, Salt Lake County
Honorable P. C. Evans, Judge

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

This is an action to recover damages resulting from an assault and battery of respondent by employes of appellants, taking place on the property of the giant racer operated by appellants, not on the loading platform, as appellants state, but on the floor of the entrance near G, shown on the drawing appearing on page 3 of appellants' brief. As shown on that drawing, there is no gate, fence or other barrier between the stairs and the entrance between the wing fences, one of which extends be-

tween O and P, and which flank the entrance to the loading platforms C and B, nor between the entrance and the loading platforms themselves, nor any signs to keep out. (Tr. 111). C is the west loading platform and B the east. The operating platform A is about 18 inches below the loading platforms. (Tr. 77). The black lines on the drawing which indicate the wing fences, extend on south to a point below the cash registers shown on the operating platform where they turn east and west respectively to the edge of the loading platforms abutting on the tracks.

As indicated on the drawing and testified to by employes of appellants, fares are not collected from passengers on the cars which travel over the giant racer tracks until the passengers have been seated on the cars and a bar put in place in front of them. (Tr. 175). On the night in question in this case three employes of appellants collected fares from the passengers, each one collecting fares from two of the six seats making up a tandem of cars, three seats to a car. On page 2 of appellants' brief it is stated that "The payment of the admission to Saltair did not entitle one to ride the racer — that called for an additional fee, *which appellee, or any of her party, never paid or offered to pay.*" Of course, as shown above, this is a misleading and unfair statement. And, of course, the public is invited to come onto appellants' racer premises.

Counsel for appellants keep insisting (Brief, pp. 4-5) that the cars running on the west set of tracks were sufficient to take care of the people then desiring to ride. Yet Mr. Bettilyon testified that respondent and her party came into the entrance to the racer and located about at point G *in the entrance*. (Tr. 77). Mrs. Bettilyon stated they waited

at about F on the *entrance* platform and that there was a crowd of people there and they could not get any closer. They waited 15 or 20 minutes. She further stated, "The crowd didn't seem to be moving up very fast at all." (Tr. 90-1).

The scale on the drawing shows the loading platform to be 48 feet long and 6½ feet wide from F and O to the south cross fence separating the loading platform from the unloading platform D and E. Mr. Webb testified that the west platform had a crowd backed up to about F on the drawing, (Tr. 102-3) and they could not get any nearer. Only the cars on the west tracks were running. There was a tandem of cars on the east tracks, standing idle. (Tr. 103). Respondent and her party never got seats in the cars and hence paid no fares.

The evidence shows without contradiction that Bernard L. Bettilyon and respondent are brother and sister, and Kenneth Webb is respondent's husband, and Hope Bettilyon is the wife of Bernard L. Bettilyon.

We will refer to Bernard L. as "Mr. Bettilyon," and Kenneth Webb as "Mr. Webb" hereinafter.

To the writer this case had one astonishing aspect. One would naturally expect that the fighting which took place on the night in question was preceded by curses, great anger, abuse and name-calling. Nothing of the kind took place. All the witnesses agreed on that.

At about 9:30 in the evening Mr. Bettilyon and wife took the train to Saltair, danced two or three times, left the dance floor about 10:30 to 10:45; before the 11 o'clock intermission, met Mr. Webb and his wife, and all four went to the racer and stopped at point F, north of the west loading plat-

form, where they stayed 15 or 20 minutes waiting for a ride on the racer. They moved east. There are two tandems of cars operated on the west track. (Earl Cochran, Tr. 155 and 175-6).

Mr. Bettilyon stated he would get the boys to start the cars on the east side. At point L he leaned on the fence and finally one of the boys looked over "and I asked him if they wouldn't start up the other line of cars, and he said something to the effect that they would be starting up in a little while and there was no use hurrying and that they would get it done eventually." (Tr. 78).

"They were very, very nice." "I asked them some questions about the operating of the racer." "We bantered back and forth. I made reference to the fact they were giving pretty lousy service, and they laughed back and asked me what business I was in, and did I always give good service." "All very friendly, we were laughing back and forth." "Eventually I said something to the effect, well, since they didn't want our money we had to take it and give it to another concession, and one of the boys whirled and said if I didn't like the service I knew what I could do, and I said yes, I guess I knew what I could do. . . . he shouted to me . . . to get the hell out of there, something like that. . . . I believe I said 'Go jump in the lake,' and then turned and started up to the north. . . . I was still squatted down." (Tr. 78-80).

"The fellow who had made the remark was on platform A and he leaped across these cars and got over here . . . and turned me around and shoved me back. (He used) both hands. . . . I was taken completely off my feet and I immediately swung and missed him. (He) simply flew right in and the next moment we were fighting for all we were

both worth. . . . Immediately he was joined by two other men from platform A . . . who started right in on me without any provocation, raining blows from every angle. . . . At point M three were on me. I wanted to get out of there. In fact I didn't want any trouble to start with. . . . I tried to get out, tried going back up; in fact I was being backed up (north all the time)." (Tr. 80-2).

> "I know I was grabbed several times and held while other people hit me in the front and back and eventually I got down to about point O, where I was knocked out." (Tr. 83).

Earl Cochran, the employe of appellants who first talked to Mr. Bettilyon, testified that a "Slim" Bernard Lynch, a friend of his who did not work there, took hold of Mr. Bettilyon from behind and took him over about to O and that Bettilyon wrenched loose and started to fight again and Jack (Lampere) hit him. "That is when I hit Mr. Webb. . . . After I hit him he was over here . . . between G and F, . . . out towards the center (of the entrance platform)." (Tr. 151-2). He further testified that none of appellants' four employes got any black eyes or bruises, and that on the previous trial that "There were a lot of them, I will tell you that; there was quite a few swinging wild around there; "*I know we had to take them all.*" (Tr. 170).

Further that Bettilyon *was working north up the platform* toward the entrance and that he (*Cochran*) *was not backing up.* Further that on the previous trial he testified, "I went across there and I grabbed his hands, like this" and that he was a little mad, (Tr. 171) although in this trial he testified that he never touched Mr. Bettilyon until Mr. Bettilyon swung at him. (Tr. 148; Tr. 172). In the

previous trial Cochran testified Bettilyon said, "You come and put me over there," and he said, "I will do just that."

Mr. Bettilyon was never ordered to leave the concession. Before Earl Cochran came across the cars he told Mr. Bettilyon to go around to the other side where the cars were running.

Jack and John Lampere are brothers. John Lampere testified that when Earl Cochran told Mr. Bettilyon to go around on the other side Mr. Bettilyon said, "Why don't you put me around there" and Earl said, "I will do just that," and "my brother Jack started to go over there and I started to go over there, and my brother took and handed me his glasses." (Tr. 213).

Then Lynch, an outsider and a friend of Earl's, "came into the fray." He ran in and grabbed Mr. Bettilyon. (Tr. 213½).

Jack Lampere testified to the same effect and that he himself asked Mr. Bettilyon to go around to the other side. (Tr. 235). He hit Mr. Bettilyon twice and then hit Mr. Webb. Then he knocked Mr. Bettilyon down. (Tr. 236).

Jack Lampere said a hand came over his shoulder and hit him in the face and he turned around fast "and hit someone and it turned out to be Mrs. Webb." (Tr. 237).

Respondent testified that Mr. Bettilyon got up from his crouching position at L, he called something over his shoulder and kept right on walking away, and Cochran and the Lampere brothers were "swinging at him and he was swinging back, trying to back up." (Tr. 123). "And after he (Mr. Bettilyon) was knocked out . . . (these men) walked right over my brother and started in, all of them,

on my husband. . . . One of them knocked him to his knees." "I stepped . . . one or two steps and I slapped him (Jack Lampere) and he knocked me out." When I slapped him "he was looking right at me." (Tr. 124-5).

Mrs. Bettilyon testified as to what happened to her husband, Mr. Bettilyon that "He was knocked out right flat on the floor, and the scuffle was going on all around him, and over him, and one of the fellows sort of kicked him out of the way." And after Mr. Bettilyon went down, "Well, they walked all over him and kicked him out of the way." "Then I saw Mr. Webb get knocked down to his knees." And "Well, the operation was just like that. Just as soon as Mr. Webb was knocked down Mrs. Webb was knocked out."

And

> "When Mr. Webb was knocked down, Mrs. Webb stepped out there and said 'You can't do that to my husband,' and she slapped Mr. Lampere, and he just pulled his arm back, and measured for a good one and let go."

And when asked whether respondent was knocked in a sitting or prone flat position,

> "She was prone; she was unconscious. She was just stretched out on the floor, unconscious, and Mr. Webb was able to get to his feet and come over and lifted her up to a sitting position, and he was patting her cheeks, and that." (Tr. 94-6).

Kenneth Webb testified that after the conversation between Bettilyon and Cochran "He (Bettilyon) got up and started to walk back to where we were." (He had been squatting down at L). "I imagine he had taken about five steps, something like that,

about that distance, when one of the fellows jumped over and turned him around, and gave him a push, and Lou (Mr. Bettilyon) kind of broke away, or gained his balance again, and swung back at this fellow, and when that happened there was a couple of more fellows came up there and they all got hold of Lou and I didn't really know if they were pushing him, shoving him, or hitting him, but there were fists flying."

"Mr. Bettilyon was just trying to defend himself the best he could." "I stepped in between them, and said, 'Listen, you guys, cut that out; what is the idea of this, anyway . Come on, Lou, let us get out of here.' I took hold of Lou's arm, to turn him around, and at that time somebody swung at me, and I backed up, and I might have hit back. I don't know; I don't even remember." (Tr. 105-6). And "We wanted to get out of there, and we kept trying to get up here where we could get out, and we got up to about this point in here when Lou was knocked out." (Tr. 108).

So it clearly appears:

1. That there was no quarrel or harsh or profane language preceding the melee;
2. That it cannot be said that it was a question for the jury as to who started the trouble.
3. That Mr. Bettilyon never was ordered off the premises, but only asked to go around to the west side of the loading platform.
4. That both Mr. Webb and Mr. Bettilyon (respondent's husband and brother) were down before she intervened, and that they were in danger.
5. That no conduct on the part of Mr. Bet-

tilyon justified the conduct of Cochran and the two Lamperes, and that Mr. Bettilyon was not at fault, and was not the aggressor.

6. That no conduct on anybody's part justified the assault on respondent.

7. That Mr. Bettilyon started to leave the east platform before Earl Cochran came over the cars, and that he was traveling towards the entrance at all times, and that Cochran and the two Lamperes were following him right up from point L to beyond point O on the entrance platform.

EXTENT OF RESPONDENT'S INJURIES

MR. BETTILYON was knocked out and did not see respondent knocked down.

MR. WEBB testified that prior to the evening of June 22d, at Saltair, his wife (respondent) was in very good health; that he worked late every night, and that Mrs. Webb would cut the lawns and do the watering, the housework, etc., and that she never complained to him of any illness or inability to do her work. (Tr. 111-12), and further:

Q. Now, what has been her physical condition, as you have observed, since June 22d, how has she been around the house?

A. Well, after that time she got up Sunday morning, when we got up, and was complaining about an awful headache, and we thought it was just a natural reaction, and never paid much attention to it. That went on for a couple of weeks, and she had never complained very much, but she al-

ways complained of a backache and headache, and often she would really have to go lie down. It would get her to where she couldn't stand up any longer and it was about that time that we had to call the girls in from upstairs, to come down and do some of the housework, and cook the meals, because my wife would try, but she couldn't keep up that long to do it, and she just went down in health, started going down from that time on, and I really didn't know very much about what was wrong, but I wanted her to go to the doctor

. . . . . .

Q. Just tell us, has she been able to perform her household duties as you described them prior to June 22d with as much efficiency since that date in your home up to the present time?

A. No, she has not.

Q. Is she entirely well yet, as far as you know?

A. No, she isn't. (Tr. 112-113).

MRS. WEBB testified that she had missed her monthly period a little over two weeks before the night in question, and that the morning after she was knocked down at Saltair that her neck and face were all swollen up, she was black and blue, her back hurt to even move, and she had awful pains in her abdomen, and severe headaches, and was nervous. The swelling in her face and neck stayed three or four days, and the headaches were like a pressure right around her head; it hurt worse to lie down than to stand up, and that she was just

getting back to normal so that she could go to bed and sleep on January 30, 1941, a little over six months after the occurrence at Saltair.

Six days after she was knocked down, she started to hemorrhage, and hemorrhaged continuously up to the 1st of January, 1941, she was so bad she could not put her feet to the floor and the emissions were large blood clots. (Tr. 128-9). That these hemorrhages would last for eight or ten days or longer, and then cut down just a little bit, but they never stopped. She did not consult a doctor until October, 1940, when she consulted Dr. J. U. Giesy, and he gave her electrical treatments every other day up to the time of trial in January, 1941. She was not able at the time of the trial to do all the work and things about the house she used to do. (Tr 129-30).

On cross-examination respondent said she did not learn of her condition until some time in November, and that her doctor did not tell her anything at first, and that after she finally got her doctor's opinion, she went to her attorney, and he said he would not make a new complaint until he had talked to the doctor. She talked to her attorney some time in November. (Tr. 138-9).

DR. J. U. GIESY, a physician and surgeon, testified that he examined respondent on October 2, 1940, and found her to be in a weakened physical condition, an anemic condition, and somewhat in a nervous condition; he found a large, congested, and displaced uterus, the mouth of the uterus he found more open than normal, and tender through the pelvic region; he further testified as follows:

Q. From that examination of the uterus

could you tell whether or not there had been any loss of blood?

A. I could do so, for the simple reason that loss of blood was manifested by the blood conditions indicating loss of blood, and by the fact that there was oozing of blood still continuing.

Q. Doctor, assuming that the plaintiff in this case had passed her regular menstrual period by about two weeks, and that on June 22, 1940, she was struck a blow of sufficient force to cause her to sit down violently, or to fall down on her back, and that some five or six days thereafter she suffered a severe vaginal hemorrhage, accompanied by large and numerous blood clots, and that she thereafter so suffered and continued to suffer hemorrhages and blood flow and clots for ten days or two weeks thereafter, and that after that she continued to hemorrhage up until approximately January 1, 1941: Taking all of these facts, as I have just given them to you, together with your personal diagnosis and examination of the patient on October 22nd, together with your personal knowledge and experience in the field of medicine, what is your professional opinion as to whether or not on June 22, 1940, Mrs. Webb was or was not pregnant?

MR. JUDD: We object to that as incompetent and immaterial to the issues of this case, and that the facts are not sufficiently stated to warrant a conclusion; warrant the doctor in finding the conclusion that is necessary.

THE COURT: In what respect are they deficient?

MR. JUDD: In that we think from those facts he cannot determine that she was pregnant.

THE COURT: He may be, of course, of a different opinion.

MR. JUDD: Well, I am making my record, your Honor.

THE COURT: The objection is overruled.

A. Will you state the question briefly

Q. The question is, taking all the facts as I have recited them to you, together with your personal diagnosis and examination of the plaintiff on October 22, 1940, together with your personal knowledge of and experience in medicine, what is your professional opinion, as a doctor, as to whether or not on June 22, 1940, Mrs. Webb was or was not pregnant?

MR. JUDD: May our objection stand to the question as re-stated, your Honor?

THE COURT: Yes; and overruled.

A. In my professional opinion Mrs. Webb was pregnant on the 22nd of June, 1940.

Q. Doctor, if in your opinion as you have just stated it, that on June 22nd the plaintiff was pregnant, would, in your professional opinion, would a blow sufficiently violent to propel her to the floor be sufficient to cause her a miscarriage?

MR. JUDD: I object to that as incompetent and immaterial, and not sufficiently stating the facts to warrant the conclusion called for.

THE COURT: The objection is overruled. Answer.

A. In my opinion, yes.

Q. Doctor, would the injuries described by any such patient to you on October 22,

1940, coupled with your personal examination of her, which occurred on that same date, I ask you, would the injuries described by her on the evening of June 22, 1940, coupled with your examination and your diagnosis be sufficient to cause a miscarriage?

A. Yes.

Q. Doctor, if in your medical opinion that patient, the plaintiff herein, was pregnant on June 22, 1940, would a severe hemorrhage and issuance of blood five or six days thereafter, continuing for a period of ten days or two weeks thereafter constitute a miscarriage — taking the facts as I have related them to you in the first hypothetical question I asked you, and assuming she had missed her menstrual period for two weeks prior?

A. Answering the assumption that Mrs. Webb was pregnant on the 22nd of June, 1940, the answer would be "Yes."

Q. Doctor, assuming that the plaintiff in this case, Mrs. Webb, was pregnant and in a normal state of health on June 22, 1940, but assuming that on that date she was struck a blow of sufficient violence to cause her to sit down violently, or to fall prone on her back, and having your opinion that the facts just related might be sufficient to cause a vaginal hemorrhage, I ask you, is it your professional opinion that said hemorrhage, vaginal hemorrhage, might continue for a period of four or five months after the date on which the blow was struck and with lesser intensity, or would that

hemorrhage continue, might that hemorrhage continue at intervals?

A. Under the hypothetical assumption then, hemorrhage in such a case which had resulted in a miscarriage might continue, more probably, through a period of months at intervals after the initial hemorrhage following or accompanying the direct miscarriage.

Q. Now, during this period of time you have seen her, did your personal examination of her on those occasions from October 22nd to about the Christmas holidays reveal to you that she was still suffering hemorrhages?

A. At intervals, Mr. Brady.

Q. What has her condition been the last two times you have seen her these last two months, her physical condition?

A. Between December and January she had quite a definite hemorrhage. Since then there has been no pronounced or visible bleeding, as far as I have any information on the subject.

Q. That hemorrhage condition you speak of occurred as late as the Christmas holidays?

A. Somewhat later.

Q. What is her condition today, or as of the last time you examined her?

A. There is an improvement.

Q. Would you sav that she is now a well, healthy woman?

A. No.

Q. How much time do you anticipate with the treatment you are giving her, it will take before she is once again a normal, healthy woman?

A. Frankly, Mr. Brady, I imagine the active local treatments are about ended. It may take a little time to return her physical tone.

Q. Would that be by natural processes or by medicinal processes?

A. Well, it would be largely by natural processes. Some of it might be due to some medicinal treatment, if it was found advisable.

Q. Now, one further question. You spoke about the displacement of the uterus. Would you explain that a little more in detail to the jury, what you found, and what your opinion is as to what caused that displacement, and how it was displaced?

A. Well, there are several types of displacement of the uterus. In this particular case the uterus was, as we say retroverted, that is, tipped back. It wasn't bent, which means it would be a retroflexion. It was tipped definitely backwards, or retroverted. In my opinion, that retroversion has been caused by a uterus which had suffered, and — well, suffered from the effects of what I had already found to be a miscarriage, and had never returned to normal size, a condition in medicine that is known as a uterus which has become enlarged for some reason or other, and has not returned to its normal size, in which there was a

swollen, enlarged condition of the uterine organ. An organ of that kind somewhat enlarged and somewhat over weighted so that its swollen condition may easily, upon sudden or sharp exertion or lifting, or anything of that kind, become displaced, and generally it will displace backwards.

Q. Could that displacement, as you have described it to the court and jury, be caused in itself by an application of superior force, is that a medical possibility?

A. Oh, there is a medical possibility of the uterus being displaced backwards, and some other direction, by certain motions of force, yes.

Q. Doctor, in your medical opinion, would the miscarriage and hemorrhages which you have described have any effect on the patient's nervous system?

A. You see, in my opinion, in this particular case this displacement of the uterus followed probably a miscarriage, and was more due to the miscarriage than it was to anything else — now, any shock or violence such as was narrated to me in this case, I having no personal knowledge of it, except hearsay, as regards the actual incident which occurred, any severe shock of that kind will have a more or less unbalancing effect on a person's nervous system, I believe. In other words, any sudden shock, any sudden injury, I think medical authority will sustain me in stating that it always results in what we call a nervous shock, in a greater or less degree.

DR. E. L. SKIDMORE, a physician and surgeon produced as a witness by appellants, testified that pregnancy and miscarriage might account for respondent's physical troubles (Tr. 201); he made no physical examination of her (Tr. 203).

He further testified as follows:

> Q. Assuming that on the evening in question, on the 22nd of June, 1940, Mrs. Webb was struck a blow by the fist of a man, and she was propelled violently to the floor at the place she was standing, and was knocked wholly unconscious for some considerable period of time, that later she was revived and escorted to her automobile, with help, and that she went home, and five or six days thereafter she had nausea in the stomach; she had severe backaches; the side of her face was swollen and bruised; she suffered severe headaches, and five or six vaginal hemorrhages, accompanied by large clots of blood, for ten or fourteen days thereafter: Would that state of facts, Doctor, enable you to venture an opinion as to whether or not this hemorrhage, these hemorrhages that she suffered were as a result of the blows inflicted upon her?

MR. JUDD: I object to that, your Honor, as incompetent and immaterial, a statement of fact, including a number of facts which are not in evidence.

THE COURT: For instance, point out the specific facts.

MR. JUDD: Well, that she was — I don't know, there were so many — if you can read it, I will point out. There were so many words used there as a speech that were not in her testimony at all.

MR. BRADY: It is a statement of fact, and no speech was intended. You have made a challenge that we haven't put the facts in.

MR. JUDD: "Violently to the floor," there is no evidence of that. There is no evidence she was knocked wholly unconscious for some considerable time. That is absolutely false, because her husband said he went to her and he sat her up and patted her cheeks and she came to, and he lifted her up and took her over onto a bench.

MR. BRADY: Your own witness testified he saw them go down underneath the pavilion and she was escorted down there.

MR. JUDD: I have made my objection, and pointed out, and I can continue to point out.

THE COURT: The objection may be overruled.

A. Yes.

Q. Yes what?

A. That is the answer

Q. From those facts you would say she might have been pregnant?

A. Yes.

Q. And might have had a miscarriage?

A. Possibly.

ARGUMENT

Appellants' Theory

Counsel reiterates on page 22 of appellants' brief the statement that the appellee and her party at the time of the altercation, or subsequent thereto, never had offered to pay or paid the required fee for a ride on the racer. As clearly appears from the record, reference to which is made in our State-

ment of Facts earlier in this brief, no fee is paid to ride on the racer until the passenger is seated in a car and the bar placed in front of the seat, whereupon the employes collect just before the car is dispatched over the racer. This statement is manifestly unfair and misleading. They further state on the same page that Mr. Bettilyon was the leader of the party and that "following his approximately four hours at a highball convention in the Newhouse Hotel that he was at Saltair to do foolish and uncalled-for things for the amusement of his party; that in going down on the east side *he was at a point where he had no right to be.*"

It appears from the evidence that he had been at a 20-30 Club convention at the Newhouse Hotel from 3:30 to about 7:30 p. m., and that he had had six or seven cocktails at the most during that period of time, that after the convention was over he drove his car home, with a friend as a passenger, had supper and left the house and proceeded to go to the depot and then to Saltair, and that they had nothing to drink after the convention. (Tr. 72-4). Here again we have counsel saying that he was at Saltair to do foolish and uncalled-for things for the amusement of his party, an obviously unfair and unjustified statement.

It clearly appears from the drawing and from the testimony that there were two platforms for passengers at the giant racer. Counsel states that Mr. Bettilyon was at a point where he had no right to be, and that appellants' "boys," after several times inviting him to leave, were fully within their rights in going over to him to try to induce him to go

around where he would not cause them trouble in the operation of the racer.

Of course, the racer was a resort concession and soliciting the public to patronize it, and the public was invited to come upon the racer's concession and ride the cars on the racer. Counsel say that for him to be where he was "created a constant hazard to the safety of the racer operation because it diverted the attention of the boys from their work; that when they invited him to leave and he did not, he became a trespasser and was subject to removal."

The evidence shows that Mr. Bettilyon never was invited or asked to leave the concession, that everything was pleasant and agreeable until he said they apparently did not want his money, and they would spend it on some other concession, whereupon Earl Cochran and the others went into action for the purpose stated by Earl Cochran as hereinbefore set forth of "taking them." Under all the evidence, all that Cochran ever did was to ask Bettilyon to go over to the other side where the cars were then running, and never to leave the concession. I wonder what counsel thinks Mr. Bettilyon should have done when Mr. Cochran, after saying, "I will do just that," came leaping over the course on the east side in pursuit of Mr. Bettilyon, who was walking back to the entrance? When respondent slapped Jack Lampere, her brother was knocked out, lying on the floor, and, as she testified, was being kicked out of the way, and her husband had been knocked to his knees. It seems perfectly clear that the alarm she said she felt as to their danger was natural and justified.

ASSIGNMENTS OF ERROR HAVING TO DO WITH PREGNANCY AND MISCARRIAGE

On page 24 of their brief, counsel take up assignments of error Nos. 1 and 2, the first being an objection as to the question asked respondent as to whether she could tell the court whether or not she was pregnant on the evening in question. Of course, she was not competent to testify to that fact. She did not testify to the fact either one way or the other. In response to the question she said, "I had missed my period before, monthly period, a little over two weeks." So that the ruling of the court, overruling the objection, was entirely harmless. And, of course, the motion to strike her answer above set forth was properly denied.

We have no quarrel with the statement that the question of whether or not she was pregnant is one of science and must be determined by the testimony of skilled, professional persons. In the second Oklahoma case cited by appellants, the two physicians who testified on behalf of plaintiff testified against her, and the court properly held that to sustain her theory that the distention of her bladder caused the stitches to tear, and that the tearing of the stitches caused the bladder to fall, was untenable unless she had competent medical testimony to support it. In the third Oklahoma case cited by counsel, the only evidence in behalf of the claimant was his testimony that he was gassed and that that caused his disability. No skilled witness supported that claim.

AS TO PREGNANCY AND MISCARRIAGE

Starting on page 27 of their brief, appellants assert that respondent failed to produce evidence tending to support her claim that as a result of the injuries

inflicted upon her by the assault and battery that she suffered a miscarriage and lost her unborn child. Appellants requested the court to instruct the jury that there was no substantial evidence that respondent was pregnant at the time of the alleged assault and battery.

We have set out heretofore the testimony of Dr. Giesy produced by respondent, and Dr. Skidmore, produced by appellants, and it seems clear that under their evidence there was ample testimony to justify the submitting of the question of whether respondent suffered a miscarriage to the jury. Dr. Giesy testified positively as hereinbefore set forth under the heading, "Extent of Respondent's Injuries," that in his opinion respondent was pregnant at the time of the assault and battery, and Dr. Skidmore stated that he could not say that she was not. Dr. Giesy, of course, was in a position to give a competent opinion because of his knowledge of her condition and his examination and treatment of her, and the condition of her pelvic region. Both doctors testified that a blow sufficiently violent to propel respondent to the floor would be sufficient to cause a miscarriage.

In the Louisiana case, cited on page 29 of appellants' brief, the court said that it was not in the slightest degree convinced that the "slight accident" described had anything to do with the abortion in question, and that in a matter of serious import to itself the court would not act on it. The court's belief as to the facts in a law suit have no place in a case in Utah. Louisiana is a civil law State. A judge in Utah would have no power to substitute his opinion as to what the evidence showed for the opinion of competent medical experts. In the second Louisiana case cited on page

32 by appellants, it appeared that one doctor said he did not know whether the trouble suffered by the claimant could possibly have been caused by a blow and that he would not know whether it was a probability in the case, and that the other doctor who had treated claimant for two and one-half years gave no opinion.

In the Kentucky case cited by appellants on page 33, the Court held that they could not agree with the contention that the miscarriage was not shown to have been the direct result of the collision.

In the Michigan case cited on page 35, the Court stated that the evidence did not disclose evidentiary facts, and that the expert had but a theory that plaintiff was sterile because she did not become pregnant, and that probative evidence must be something more tangible than a mere pyramiding of theories. In the instant case, there is positive testimony by Dr. Giesy that in his opinion respondent was pregnant at the time of the blow and that a miscarriage resulted from the blow.

In the Maryland case cited on page 35, the Court said:

> "The plaintiff has failed in this case to meet this burden of proof. The testimony of the doctor, whom she called, is clearly to the effect that there is no natural and reasonable connection between the accident of February 12, and the plaintiff's illness and operation of July 3. Nor is this connection shown by any other testimony on the record. *Conjecture, speculation, or mere possibility, must not usurp the place of proof of the essential facts in issue if the trial of facts is to remain a rational and just procedure.*"

ASSIGNMENTS OF ERROR BASED ON ADMISSION OF EVIDENCE UNDER CROSS-EXAMINATION

The question was as follows:

> "Now, you have described those duties you have in connection with the collection of fares. Is acting as a bouncer for the ejection or eviction of people that you think should be evicted, also a part of your duties?" (Tr. 160).

On page 38 of appellants' brief, counsel say:

> "This statement, first, is an open attempt on the part of counsel to embarrass the witness before the jury in that counsel injects into the picture a rough situation such as a bar-room or the like, where the 'bouncer' is a required part of the equipment.
>
> "Second, it assumes that appellants maintained such a place and that a 'bouncer' was necessary and that this boy was of such a character, that he would act as a bouncer.
>
> "Third, the statement assumes that as such 'bouncer' he could eject or evict people whom he thought ought to be thrown out regardless of who they were or what they were doing.
>
> "There was no evidence in the record which would warrant any inference that appellants employed anyone to act as bouncer in and about the giant racer, and particularly that this witness was employed for any such purpose. Neither is there

> anything in the record that the appellants employed anyone to eject or evict people that they 'think should be evicted,' or that this particular witness was so employed. The record shows upon its face that the sole and only reason for asking this question was to prejudice the mind of the jury against the appellants."

First, let us see what the witness thought about when he was permitted to answer the question:

> A. I don't suppose so. If they don't — well, if they don't go we have — it was never told us to do it, but we supposed we always had to. (Tr. 160).

In the 1928 edition of Funk & Wagnall's New Standard Dictionary of the English Language, on page 317, we find the following definition:

> "Bouncer . . . (5) (Slang, U. S.). A person employed to eject disorderly persons, as from a hotel or restaurant."

So, there is no question but the word "bouncer," is a recognized term in American nomenclature, and it is clearly apparent from the answer of the witness that the witness thoroughly understood it, and that he did act as a bouncer.

The argument of counsel really is ridiculous. The witness had stated his duties at the request of counsel for appellants, and he went on properly enough and testified that acting as a bouncer he supposed was a part of such duties.

Counsel say that the record shows upon its face that the sole and only reason for asking this question was to prejudice the mind of the jury against appellants. The thing that decided the jury against

the appellants was the rough and uncouth antics of appellants' employes on the night in question. Pursuing the absurdity further, we might ask when is a bouncer not a bouncer? And the answer would be, that when employes whose duty it is to seat passengers at a public concession in cars, fasten them in, and collect fares, leave their place of employment and abandon their duties in order to go out and start a rough house among the passengers waiting to patronize the concession. The cases cited by appellants are clearly not in point.

In the Idaho case, a question was asked a witness implying that suits were instituted against the husband of the respondent in that case, because of his financial condition and her extravagance. The Court said that there was no evidence on which to base any such assumption as the question did.

In the Maryland case, the court refused to permit a witness to be asked on cross-examination if he did not live at his mother's home with the woman he married, before he married her. The Court held that such testimony was entirely collateral, and did not bear in any way on the credibility of the witness, and could have no purpose save to degrade and humiliate him.

In the Indiana case, the objection to a question was sustained on the ground that it assumed facts not covered by the direct testimony of the witness. The Court held that the question assumed facts as to which there was no evidence.

On page 41 of their brief, appellants say that the question asked Mr. Cochran, and above quoted, assumed that there was some duty upon the appellants which did not exist either as a matter of law or as shown by the facts. Counsel ignore the fact that the witness had testified to the fact as to his

duties upon their examination, and that the question to which they object merely sought to elicit information as to whether or not there were additional duties.

The Alabama case cited on page 41 involved a question asked a witness who was in a car but not driving it whether he knew, as a driver of a car, that it was his duty to keep to the right when turning a corner, and the court held that the question assumed the existence of a duty not prescribed by statute nor ordinance. On page 42 of their brief, counsel for appellants argue their objections to the hypothetical questions propounded to Drs. Giesy and Skidmore on the ground that the questions contain statements of fact which were not supported by the evidence and that the facts were colored and exaggerated to the extent that they were misleading.

Under the heading hereinbefore of "Extent of Respondent's Injuries," we have set forth the questions, as well as all of the evidence, with respect to respondent's condition, and in the "Statement of Facts" at the start of this brief, we have set forth the testimony with respect to the assault and battery, and it clearly appears that competent evidence was adduced justifying every element included in the questions to which appellants object.

If it was an exaggeration of the evidence to include in the hypothetical questions that respondent was struck a blow of sufficient force to cause her to sit down *violently,* or that she was *propelled violently* to the floor, we certainly must confess an ignorance of what violently means.

ASSIGNMENTS OF ERROR BASED UPON REFUSAL TO GIVE APPELLANTS' REQUESTED INSTRUCTIONS.

Beginning on page 43 of their brief, appellants discuss the failure of the court to give the instructions requested by them.

Request No. 3 in effect would, if given, have submitted to the jury the question of whether or not Jack Lampere used unnecessary force in knocking respondent down, and would have instructed the jury in the first sentence thereof that the plaintiff (respondent here) attacked him, and that he was protecting himself, and would only leave to the jury the question of whether or not he exercised his judgment unreasonably "in his own defense." There was a dispute in the evidence. Respondent testified that Lampere was looking directly at her when she slapped him, and that he then struck her and knocked her out. Lampere was the only witness who testified that his back was turned and that respondent struck him from behind, and that he turned around and struck before he knew that it was a woman who had slapped him. This requested instruction assumes as a fact that Lampere was attacked by respondent and was defending himself and that the slap administered to him by respondent was unjustified.

From our Statement of Facts heretofore in this brief, this Court will observe that respondent testified that Jack Lampere knocked her brother out, and that (these men) walked right over him and started in on her husband, and one of them knocked him to his knees and that she stepped one or two steps and slapped Jack Lampere, and he knocked

her out, and that when she slapped him he was looking right at her. (Tr. 124-5).

The instruction requested is erroneous in assuming a disputed question of fact as a fact, in assuming that Jack Lampere was in the right, when he knocked respondent's brother out and knocked her husband to his knees just before he exchanged blows with respondent, (which he testified he did), and that Mr. Bettilyon was in the wrong, because if Mr. Bettilyon was in the right, of course respondent had a right to intervene when he was knocked down and her husband was knocked to his knees. There can be no question but that she was justified in intervening to prevent more injuries to her husband or her brother, or both. She testified that they were kicking her brother out of the way to carry on the fight.

The same is true as to Requests Nos. 4 and 6.

As stated in the closing of the Statement of Facts hereinbefore, it clearly appears from the evidence that no conduct on the part of Mr. Bettilyon justified the conduct of Cochran and the two Lamperes, and that Mr. Bettilyon was not at fault, and was not the aggressor, and that Mr. Bettilyon started to leave the east platform before Earl Cochran came over the cars with the avowed purpose of putting Bettilyon over on the west platform, and that Mr. Bettilyon was travelling north toward the entrance at all times, and that Cochran and the two Lamperes were following him right up from point L to beyond point O on the diagram on page 3 of appellants' brief, and that no conduct on anybody's part justified Jack Lampere's assault on respondent, so that neither of the requested instructions were pertinent to the issues of the case.

On page 47 of their brief, appellants request the court, in their Request No. 5, to instruct that Bet-

tilyon had no right to go on the east side of the racer platform when only the west side was being operated, and that appellants' servants "in their operation of the racer had a lawful right to use such reasonable force as was necessary after requesting Bernard L. Bettilyon to leave that part of defendants' property, to remove him from the place in question," and that " if in using force to remove said Bernard L. Bettilyon that he attempted to or did start to fight or hit the servant or servants of defendants and as a result of such assault or attempted assault the said Bernard L. Bettilyon was later injured, and that thereafter this plaintiff's husband voluntarily came into the fight and that later this plaintiff herself left a place of safety and slapped defendants' employee in the face, as a result of which plaintiff was struck by said employee, then plaintiff cannot recover in this case and your verdict will be for the defendants, and each of them, 'no cause of action'."

Counsel state that the requested instruction clearly states their theory of the case. The reason the requested instruction was not given was that the theory is untenable. Appellants were operating a public concession at a resort. The entrance and both the east and west platforms were thrown open to the public. Counsel assumes that regardless of the invitation to the public and the fact that respondent and her companions were at the racer to patronize it, that because Bettilyon went over on the east platform and asked to have the cars on the east side started in operation so as to take care of the crowd that appellants' employes had the right to order him to the west platform and to use force to remove him to the west platform and to overcome any resistance to their manhandling that Bettilyon put forth.

There are no cases in the books which justify such conduct on the part of employes at a public concession which the public is invited to visit, so how can appellants properly say that Bettilyon was in the wrong, and that therefore respondent has no remedy? And certainly, under the evidence of respondent that her brother was knocked out and that her husband was knocked to his knees, and that these employes were kicking her brother out of the way, it cannot be said that there was not sufficient justification for her interference! Bear in mind that respondent's husband was trying to stop the employes of appellants from further attacking Bettilyon, and trying to assist him in getting away. Counsel, of course, take the position that there was evidence that Bettilyon was in the wrong, and also that respondent had no right to intervene.

The cases cited by appellants are not in point, as the facts in this case do not justify the submission of any such issue as said requested instructions would have injected into the case.

On page 51 of their brief, in Requested Instruction No. 7, appellants requested the court to charge the jury that Bettilyon had no right to be on the east platform, and that if he refused to leave the east side when requested by appellants' servants, in effect that they had the right to use any reasonable force that was necessary to remove him, and that Bettilyon had no right to resist. In other words, they ask the court to instruct the jury that Bettilyon was a trespasser after he was asked to go to the west platform and did not do so, and that the ensuing assaults by appellants' employes on Bettilyon, on Webb and on respondent were perfectly proper.

Where did the right of these bouncers originate? What gave them any authority or right to man-

handle and beat up people who came to the racer concession at the invitation of appellants?

On page 52, in Requested Instruction No. 8, appellants asked the court to instruct the jury that the owner of the premises "may rightfully restrict the use of his premises to his business guests . . ." and that "if a business guest refuses to quit a restricted portion of the premises after verbal request so to do and reasonable opportunity has been given him to depart, *he thereby becomes a trespasser and may be ejected by the use of such reasonable force as is necessary under the circumstances.*"

And counsel quote authority to the effect that reasonable force may be used to prevent a trespass or to eject a trespasser or intruder.

Counsel cites on page 53 a Utah case holding that the occupant of pemises has the legal right to admit whom he pleases and to expel anyone who abuses the privilege thus given him. The case does hold that one who abuses the privilege and is asked to depart and fails to do so becomes a trespasser, and the owner is justified in using reasonable force to eject him. There was no order for Bettilyon to leave the premises by anyone. He had abused no privilege, and all the evidence is to the effect that because he failed to heed the capricious orders of appellants' bouncers *to go to another part of their premises*, they had the right to forcibly eject him.

As heretofore stated, there is no authority, in our opinion, which supports counsel's contention.

On page 54 of their brief, appellants theorize that before respondent intervened in defense of her brother and husband, the fracas had come to an end. They call attention to the fact that one Bernard (Slim) Lynch, not an employe of appellants and an

outsider, grabbed Bettilyon by the arms and told him "that he had better get out" and that he, Lynch, proceeded to eject him and that Bettilyon got loose.

Can there be any question but what this was merely a continuation of the unjustified conduct of appellants' employes in attempting to move Bettilyon from one platform to the other? Can it be said when the evidence shows by the testimony of appellants' own witnesses that Bettilyon was constantly moving north toward the entrance, and that Cochran and the Lampere brothers were constantly following him up while he was backing and travelling north and trying, not as counsel would have you believe to move him to the west platform, but to beat him up and brutalize him, that Bettilyon was the aggressor at any time? He was properly resisting a manhandling by Cochran to begin with, and trying to prevent being beat up by Cochran and the Lampere brothers from then on. If employes of a concession, inviting the public to patronize it and visit it, can justify conduct such as there was on the night in question, we had better have a new set of laws to protect the public from thugs employed by concession owners, because a ruling that their conduct on the night in question meets with the approval of the law would probably precipitate an era of assaults by concession employes who could find any excuse to demonstrate their fistic and roughhouse ability on concession patrons.

In this connection, this Court will observe from the evidence that all three of appellants' employes were big, strong fellows, any one of them superior in size and build to Mr. Bettilyon, and that while Bettilyon was knocked out, Webb was knocked to his knees and respondent was knocked out, not one

of these employes got a bruise. Each one so testified.

The trouble with appellants' theories as to the issues in the case was and is that they are untenable, and that under the evidence the giving of their requested instructions would have confused and misled the jury, and would have invited a miscarriage of justice.

ERRORS BASED UPON INSTRUCTIONS GIVEN.

On page 58, counsel complain of the court's Instruction No. 4, that respondent was a guest at Saltair that night, and had a right to remain there as long as said resort remained open to the public that evening.

Counsel assume in their argument that the instruction was that they were guests on the racer, regardless of their actions. Of course it is admitted that respondent and her companions were paid guests at Saltair. They had been dancing and came down to have a ride on the racer. Is there anything in the evidence which would make it improper or harmful for the court to instruct the jury that they were guests at Saltair Beach and entitled to remain there that evening? Saltair Beach was not a party to the suit. What prejudice could there be from such an instruction? To make the question harmful, there would have to be evidence that respondent and her companions were requested to leave Saltair Beach for some reason. The racer was a concession operated separately from the resort by appellants.

On page 60 of their brief, counsel say the court erred in giving Instruction No. 5, by which the

court told the jury that if they found from the evidence that respondent was apprehensive that her husband and brother, or either of them, were in danger of bodily harm, and that she interceded in the affray to protect either or both, that she was justified, and that if they further found from the evidence that she was rendered unconscious by a blow from one of appellants' employes, the mere fact that she participated in the affray would not bar her from recovering damages.

Certainly it is a question for the jury as to whether her husband and brother were in danger, and that issue was properly submitted.

Counsel's objections to that instruction, and the instruction numbered 6, which stated that a person is justified in using sufficient force to prevent a consummation of injury as a result of apparent danger to family members raised the question involved in their theories of the case. If the Court is of the opinion, and we think the evidence would justify no other opinion, that appellants' employes were in the wrong and that respondent's husband and brother or either were in danger, then appellants' whole theory is untenable. In other words, if the court was justified in refusing appellants' requested instructions, then the instructions as given on these points were entirely proper. We think the fact is clear and undisputed that respondent's husband and brother were being unlawfully and unjustifiably assaulted and battered. If the Court can say that Bettilyon was in the wrong, then of course appellants' theory would have been proper for submission to the jury. But where is the evidence to the effect that Bettilyon was wrong at any time, or was the aggressor at any time?

On the general proposition as to the rights and duties of a person assaulted, we call the Court's attention to

4 Am. Juris., Published in 1936, Section 47, Page 151, where it is said:

> "The ancient doctrine which makes it the duty of a person assaulted to 'retreat to the wall' before he is justified in repelling force by force has been generally modified in the United States. The rule now generally accepted, is that one who is assailed may meet force with force without retreating, so long as he uses only such force as is necessary, even though he might with absolute safety avoid the threatened injury or bodily harm by retreating."

Our contention, of course, is that Cochran had no right to attempt to move Bettilyon from the east to the west platform, and that his racing across the cars from the working platform to the east loading platform, and either attempting to strike or grab hold of Bettilyon constituted an assault, an attempted assault and battery, or an assault and battery. What would counsel require Bettilyon to do when Cochran, after saying, "I will do just that," when Bettilyon said why don't you put me around there, rushed, as he said he did, across the cars and at Bettilyon? It is clear that he either intended to attempt to move Bettilyon around to the west platform or commit a battery on him, and all Bettilyon did at any time was to protect himself. According to the testimony, not only the three employes of appellants, but Slim Lynch, an outsider, committed assaults and batteries on Bettilyon.

There is no question about respondent's right to recover damages for her actual injuries, the consequent pain and suffering as a result of the personal injuries, including a miscarriage, and the damage to her clothing.

We are unable to find any authority which would justify the awarding of damages to the respondent for the loss of her unborn child. The jury must have believed that a miscarriage resulted from the battery committed on the respondent, and in view of this fact, we do not believe the verdict to have been excessive, even if the element of damages for the loss of the unborn child were eliminated, but, of course, the jury were entitled to take that into consideration under the instructions, and we must assume that some portion of the damages awarded by the jury represented the loss of the unborn child.

The case is unquestionably one of liability, and the personal injuries, and the resulting disability and miscarriage of course would justify a verdict for a sum as large as respondent recovered.

The only suggestion we can make to avoid the necessity for a new trial is that this Court give the respondent the option to accept a reduction in the amount of the damages recovered to an amount to be fixed by this Court.

Respectfully submitted,

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